OGILVY & MATHER DIRECT (M) SDN BHD

v.

STAMFORD COLLEGE GROUP

HIGH COURT MALAYA, SHAH ALAM
SURIYADI HALIM OMAR J
[CIVIL APPEAL NO: MT1-12-166-2001]
25 JULY 2003

CONTRACT: *Construction - Ambiguity in contract - Terms of the agreement - Whether there were implied or express terms - Whether there was intention of exclusivity - Whether obvious - Breach - Allegation of - Whether defendant acted in conflict with terms of contract - Whether exclusive contract required for business efficacy - Test in BP Refinery (Westernport) Pty Ltd v. Shire of Hastings - Whether satisfied*

The plaintiff in this case alleged that *vide* an appointment document (P9) the Stamford College Group (the defendant) had appointed it as "the advertising agency" for the defendant's company, construing it as an appointment of exclusivity. When the defendant failed to offer any substantial work to the plaintiff and had used other advertising agencies to carry out the task of advertising, the plaintiff asserted that the defendant had acted in conflict with the terms and conditions of the contract. Subsequently, the defendant terminated the agreement and in reply, the plaintiff had put the defendant on notice of its breach of the exclusivity term of contract. The defendant denied that there were any terms expressed or implied in P9 and further denied any breach on its part. The sessions court dismissed the suit, and the plaintiff appealed.

Held:

[1] There was nothing in the construction of cls. 1 and 8 (the relevant provisions) in P9 as to the length of period of the appointment or the effect of any breaches by any party. The plaintiff's stand that the words "The advertising agency" in the preamble had alluded to a message of exclusivity was unacceptable. Surely if exclusivity had been the intention, parties would not have hesitated to use words like "the sole advertising agency", "the exclusive advertising agency" or adjectives of similar effect. (pp 231 h & 232 a-b)

[2] The exclusiveness was not obvious. The fact that it could easily be expressed but not done, must be taken against the insertion of an implied term. (p 233 e)

[3] An exclusive contract was not required in the circumstances of the case to bring about business efficacy; there was nothing indicated in the agreement that prevented the plaintiff from taking up other advertisement offers from other clients. It would contradict the other terms and reality of business of the defendant, especially when there was no reciprocity on the part of the plaintiff that would be beneficial to the defendant. The obvious business of the defendant was that of education, with the plaintiff roped in to ensure that a wide spectrum of the public would be invited to disseminate that fact. Logic would certainly militate against terms which would curb its ambitious program. (p 233 g-h)

[4] The criteria, as set out in *BP Refinery (Westernport) Pty Ltd v. Shire of Hastings* have not been satisfied herein without the implied term and there being no express terms to support the plaintiff's assertion, the court had to reject the appeal. (p 234 d)

[Appeal dismissed with costs.]

Case(s) referred to:

Ayer Hitam Tin Dredging v. YC Chin [1994] 3 CLJ 133 SC ***(refd)***
Bank of Australasia v. Palmer [1897] AC 540 ***(refd)***
BP Refinery (Weternport) Pty Ltd v. Shire of Hastings [1978] 52 ALJR 20 ***(refd)***
Commercial Union Assurance (M) Sdn Bhd v. Ng Chek Hung & Another Appeal [1997] 3 CLJ 189 FC ***(refd)***
Equity & Law Lie Assurance Society Plc v. Bodfield Ltd [1987] 281 EG 1448 ***(refd)***
IRC v. Raphael [1935] AC 96 ***(refd)***
Kandasami v. Mohamed Mustafa [1983] 2 MLJ 85 ***(refd)***
Liverpool City Council v. Irwin [1977] AC 239 ***(refd)***
Luxor (Eastbourne) Ltd v. Cooper [1941] AC 108 ***(refd)***
M Prabhakaran v. Salam Seran [2001] 3 CLJ 615 HC ***(refd)***
Mat Shah Mohamad & Anor v. Foo Say Meng & Ors [1983] 2 CLJ 194; [1983] CLJ (Rep) 254 FC ***(refd)***
Mosvolds Rederi A/S v. Food Corpn of India [1986] 2 Lloyd's Rep 68 ***(refd)***

Pioneer Shipping Ltd v. BTP Tioxide Ltd [1982] AC 724 ***(refd)***
Reardon-Smith Line Ltd v. Hansen-Tangen [1976] 1 WLR 125 ***(refd)***
Reigate v. Union Manufacturing Company (Ramsbottom) Ltd and Elton Corp Dyeing Company Ltd [1918] 1 KB 592 ***(refd)***
Smith v. Cooke [1981] AC 297 ***(refd)***
Smith v. Lucas [1881] 18 Ch D 531 ***(refd)***

For the appellant - Trevor De Silva; M/s Shook Lin & Bok
For the respondent - Rajinder Kaur; M/s Rashid & Lee

Reported by Suhainah Wahiduddin

JUDGMENT

Suriyadi Halim Omar J:
The plaintiff had alleged that, *vide* a letter dated 21 April 1987 (exh. P9) the defendant had appointed it as "the Advertising Agency" for the defendant's company effective 1 May 1987. Both parties had signed that document. Relevant to the appointment as documented in it, *verbatim* were as follows:

> Preamble: This confirms that Ogilvy & Mather Direct (Malaysia) Sdn Bhd has been appointed the Advertising Agency for the Stamford College Group effective 1st May 1987.
>
> Clause 1: The agency will handle the creation, production and placement of advertising in all media for the Stamford College Group and will bill you for all media costs at the official rates charged.
>
> Clause 8: This appointment may be terminated by giving written notice of at least 90 days. During the 90-days period all advertising for the Stamford College Group will continue to be placed by Ogilvy & Mather Direct (M) Sdn. Bhd.

Pursuant to the language of the contract, the plaintiff had construed it as an appointment of exclusivity as the defendant's advertising agent, with the requirement to carry out all the above instruction laid down in cl. 1. Subsequently it transpired that the defendant had begun to fail to offer any substantial work to the plaintiff, and had in fact used other advertising agencies to carry out the task of advertising since March 1995. On receipt of that information, the plaintiff *vide* a letter dated 31 March 1995 had reminded the defendant with the following words, "Stamford College provides

exclusivity to Ogilvy & Mather Direct to handle all creation, production and placement of advertising for all media". The defendant neither replied nor denied the contents of this letter. *Vide* another letter (exh. P10), the plaintiff asserted that as no termination had taken place, the defendant thus had acted in conflict with the terms and conditions of the contract, which had assured the plaintiff of that exclusivity. In response to that last letter, the defendant five days later terminated the agreement by giving three months notice, with effect from 1 May 1995.

In reply, the plaintiff's solicitors put the defendant on notice of its breach of the exclusivity term of the contract, and further alleged that by reason of that breach the plaintiff had suffered loss of revenue for the months of March and April 1995. Through another letter dated 20 June 1995 (exh. P15), the plaintiff's solicitors demanded damages in the sum of RM112,168 being 15% of the defendant's loss, ie, had it obtained the orders to carry out the lost advertisement job. In a nutshell, the defendant had expended about RM700,000 on advertising fees on other agencies, and the plaintiff was merely asking 15% of the lost fees, for jobs which were supposed to be its exclusive domain.

In reply to the plaintiff's claim as per the statement of claim, the defendant had vehemently denied that there were any terms expressed or implied in the appointment document, which provided that the plaintiff was to have exclusivity in handling all creation, production and placement of advertisement in all media for the defendant. In fact it denied any breach of the terms contained in the letter of offer dated 21 April 1987. The altercation between the plaintiff and the defendant culminated in a suit being filed, with it being heard later by the Sessions Court judge, but dismissed.

The plaintiff subsequently filed the relevant notice of appeal and I had presided over the appeal.

It is quite established that for an appeal court to disturb the findings of the lower court, it takes more than a simple difference of opinion to do so. Any drastic action of setting aside the decision of the court of first instance must depend on the circumstances of the case, in particular whether the court had adverted to wrong principles of law, fundamental enough to warrant that interference. If so, an appeal court is justified in reversing that decision. In fact it is duty bound to do so. On the other hand if that onerous burden of proving that justification is not established to the hilt the appeal

regretfully must be dismissed (*M. Prabhakaran v. Salam bin Seran* [2001] 3 CLJ 615; *Commercial Union Assurance (M) Sdn Bhd v. Ng Chek Hung & Another Appeal* [1997] 3 CLJ 189; *Mat Shah bin Mohamad & Anor v. Foo Say Meng & Ors* [1983] 2 CLJ 194; [1983] CLJ (Rep) 254).

After having heard the submissions of both parties, and having perused the notes of proceedings, I had mentally concluded that the success of the plaintiff's case hinged primarily on the construction of the appointment document (P9). Thankfully both parties also seemed to be in agreement with the court's stance. Despite their agreement, I could not help noticing that at all times the plaintiffs deliberate approach was that the court should only focus on the document (P9), and not on extraneous matters, on the premise that that impugned document was sufficiently clear. In fact it had meticulously sidestepped even any reference to its own witnesses and their testimonies, let alone the opponent's. The nearest to any reference to the testimonies of the witnesses was this submission:

> The plaintiff however submits that as the instant case is essentially one of construction of a legal document *viz.* the contract, and as the learned Sessions Court judge did not make any findings on the credibility of witnesses or finding of facts based on the credibility of witnesses, but arrived at her judgment by drawing inferences, there is no fetter in law on this Honorable Court, which is in a good position to review and evaluate the evidence as the trial judge.

To begin with, after ventilating that opinion the plaintiff's counsel stepped on the brakes, and made absolutely no attempts to discuss or highlight the salient evidence of the witnesses. On further prognosis, the above view that the learned judge never made any finding of facts, or arrived at her decision by drawing inferences, did not strike a right cord or agree with the meticulous analysis of the evidence, as reflected by the court's judgment. I came around to this view, as after noticing the approach of the plaintiff of merely concentrating on P9 and the law pertaining to the tenets of construction, I had sieved the evidence and had discovered why. The extraneous evidence was certainly against the interest of the plaintiff. It was highlighted by the plaintiff's very own witness (SP1) that between the years of 1987 and 1995, the defendant had on many occasions utilised the services of other advertising agencies, but yet had never seen it fit to lodge a protest against that supposed breach. This lack of reaction could only be interpreted negatively as against its interest, even as far back as pre 1995, in that even the plaintiff had not construed the appointment as exclusive in nature. The

veracity and footing of the plaintiff's witnesses were questionable as eg, SP1 was yet to be employed at the time of the appointment and had never personally heard the supposed complaint of one Caroline Lim who worked for the plaintiff as regards the breach. Naturally she knew nothing of the intention of the plaintiff in 1987. Apart from that, the signatory on behalf of the plaintiff ie, one Tony Hemmings, was not called to adduce evidence; that supposed mysterious Caroline Lim likewise was also not subpoenaed to testify. At the other extreme end, the defendant's witness SD2, holding the position of managing director in the defendant's company, in clear terms had denied that P9 was an exclusive offer to the plaintiff, and had further asserted that had that been so, the exclusiveness would have been indicated.

The above stance taken by the plaintiff's counsel indisputably, is in line with the general law (exceptions aside), that where a contract is made wholly in writing, evidence is not admissible to add to, vary or contradict the written terms (*Bank of Australasia v. Palmer* [1897] AC 540). Evidence of the subjective intention of the current parties in reaching the agreement would certainly be inadmissible. Since the plaintiff had correctly abandoned any reference to the testimony of any of the witnesses or any extraneous evidence in its submission, but had instead deliberately focused its argument solely on the interpretation of the contractual document, I thus had not belabored the point but had acceded to its wishes. I had thereafter focused on P9, the very appointment document, which contained the above preamble and cls. 1 and 8.

Having identified the document I then had ascertained the words used by both parties meant for determination, subject to any rule of construction and of their legal effects. Rules of construction are merely guidelines and are not rules of law. Whilst the proper construction of a contract is a question of law the ascertainment of the meaning of a particular word, a question of fact. The effect of the words used is a question of law.

Since both parties had divergent views of the construction of P9, it thus became incumbent upon the court to discover the mutual intention of the contracting parties, with the intention being what reasonable people would take it to be, had they been placed in the protagonists' seats. As parties cannot give direct evidence of their respective intent, in a gist an objective test must be applied when construing a contract (*Pioneer Shipping Ltd. v. B.T.P Tioxide Ltd* [1982] AC 724; *Reardon-Smith Line Ltd. v. Hansen-Tangen* [1976] 1 WLR 125). That intention invariably may be ascertained

by appreciating the meaning of the words the parties have resorted to (*I.R.C v. Raphael* [1935] AC 96). In *Smith v. Lucas* [1881] 18 Ch. D 531 Jessel MR had said:

> The settlement is one which I cannot help thinking was never intended by the framer of it to have the effect I am going to attribute to it; but of course, as I have often said, **one must consider the meaning of the words used,** and not what one may guess to be the intention of the parties (emphasis added).

Lord Halsbury LC in *Smith v. Cooke* [1981] AC 297 also had occasion to opine:

> I must say I for one have always protested against endeavoring to construe an instrument contrary **to what the words of the instrument itself convey,** by some sort of preconceived idea of what the parties would or might or perhaps ought to have intended when they began to frame their instrument (emphasis added).

Having identified the relevant clauses and words for my consideration, subject to the above judicial views, regardless of the initial attempt made by the plaintiff to import extraneous documents during the trial at the subordinate court level, but abandoned during the appeal stage, I had proceeded with the deciphering and construction of the contract. In the process, whether P9 was badly drafted, or whether there were other irrelevant clauses which could detract the main ones, or the document had been insufficiently thought of by the plaintiff's solicitors, was of no concern to me. My mind had to be focused only on the meaning of the language, words and phrases in the impugned document. By analogy, Dillon LJ in *Equity & Law Life Assurance Society plc v. Bodfield Ltd* [1987] 281 EG 1448 had occasion to remark that the guidelines as to the construction of a particular type of clause (a rent review clause):

> ... cannot entitle the court to construe and apply not the clause which the parties have entered into but the different clause which they might have, or probably would have, entered into if the lawyers had thought rather more deeply about how the intricate scheme they were setting would work in practice.

I now delve onto the word as per the above preamble and cls. 1 and 8 (hereinafter referred to as the relevant provisions). Interestingly enough, nothing was mentioned in those relevant provisions, as to the length of period of the appointment or the effect of any breaches by any party. The plaintiff had stood firm with the construction that, as the words "the

Advertising Agency" in the preamble had been alluded to, a message of exclusivity thus had been intended. But was it so? Surely if exclusivity had been the intention, parties would not have hesitated to use words like "the sole Advertising Agency", "the exclusive Advertising Agency" or adjectives of similar effect. The same argument would equally be applicable in cl. 1 where before the phrase, 'handle the creation, production ...' the word solely or exclusively could have been inserted.

With that uncertainty detected in P9, it was thus a controversial document, and with that ambiguity remaining unsolved, that impugned document must be construed adversely against the party who proffered it for execution (*Kandasami v. Mohamed Mustafa* [1983] 2 MLJ 85).

If I may take the matter a step further, having scrutinised P9 it was not a question of a contract that was badly drawn, where the use of the apparent commercial purpose as an aid of construction could be invoked, but one that had words that were succinctly clear (*Ayer Hitam Tin Dredging v. Y.C Chin* [1994] 3 CLJ 133). On hindsight, if the words were clear, and nothing was mentioned of the factor of exclusivity, why purposefully import or toy with something that was never meant to be there in the first place? A court must take great care not to stir up something in a contract when parties had intentionally made it to be just what was before it, minus that hypothetically stirred up term.

I then had considered whether I could imply exclusiveness in the contract in the circumstances of the case, after adverting to the contract and the surrounding circumstances. Implied terms is quite often loosely used by lawyers in a wide variety of sense or circumstances, and had come to the fore in the case of *Luxor (Eastbourne) Ltd v. Cooper* [1941] AC 108. Among the reasons for the necessity to have the implied terms, are to give business efficacy to the contract, the dearth of which will make the contract unworkable, and that reasonable men would remark that its existence was too obvious for comfort (*Reigate v. Union Manufacturing Company (Ramsbottom) Ltd and Elton Corp Dyeing Company Ltd* [1918] 1 KB 592; *Mosvolds Rederi A/S v. Food Corpn of India* [1986] 2 Lloyd's Rep. 68). The court in the latter case had occasion to remark:

> Whether or not a term can be implied into a contract would depend on the contract itself and the surrounding circumstances. A term can only be implied if it is necessary in the business sense to give efficacy to the contract.

Lord Cross of Chelsea in *Liverpool City Council v. Irwin* [1977] AC 239 had expressed in his speech:

> When it implies a term in a contract the court is sometimes laying down a general rule that in all contracts of a certain type ... and so on-some provisions is to be implied unless the parties have expressly excluded it ... Here it is not enough for the court to say that the suggested term is one the presence of which would make the contract a better or fairer on; it must be able to say that the insertion of the term is necessary to give-as it is put-business efficacy to the contract and that if its absence had been pointed out at the time both parties-assuming them to have been reasonable men-would have agreed without hesitation to its insertion.

So, could I imply that an exclusive term to ensure business efficacy in the current case existed? Before answering that question I had to sidetrack and resolve first the factor of the dearth of any sanction in the material appointment letter on either party in the event of any breach. This poser must be taken seriously, as its non-insertion would certainly buttress the defendant's stance, (and not necessarily imply) that exclusiveness was not meant to be imported into it. Likewise the other clauses were eerily silent as to the alleged exclusiveness. At the end of the day my conclusions were that:

i. the exclusiveness was not obvious;

ii. the fact that it could easily be expressed but not done, must be taken against the insertion of an implied term;

iii. even without that implied exclusive term, an effective contract could be executed. In other words, an exclusive contract was not required in the circumstances of the case to bring about business efficacy;

iv. there was nothing indicated in the agreement that prevented the plaintiff from taking up other advertisement offers from other clients. It would contradict the other terms and reality of business of the defendant, especially when there was no reciprocity on the part of the plaintiff that would be beneficial to the defendant. The obvious business of the defendant was that of education, with the plaintiff roped in to ensure that a wide spectrum of the public would be invited to disseminate that fact. Logic would certainly militate against terms which would curb its ambitious program.

Such a foolish submission to exclusiveness without gaining anything would be unreasonable, especially as there was no sanction provided for in the agreement, in the event of a breach. That submission could force the defendant to accept even mediocre work much to its detriment, as evidenced here. An implied exclusive term thus would result in an inequitable and one-sided contract, and of course business-wise illogical. From the effect of the facts, had the absence of an expressed exclusive term been pointed out to the defendant at the material time, on the assumption that it was a reasonable person, it would have been a futile exercise to persuade it to agree without hesitation to its insertion (*Shell U.K Ltd. v. Lostock Garage Ltd.* [1976] 1 WLR 1187).

The above approach or test is in line with the case *B.P Refinery (Westernport) Pty. Ltd. v. Shire of Hastings* [1978] 52 ALJR 20 where Lord Simon of Glaisdale had said:

> In their Lordships' view, for a term to be implied, the following conditions must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.

The criteria set above, before an implied term ie, the exclusive factor may be inserted, which appeared cumulative and must be satisfied at the outset, seemed to have failed the test miserably. Without the implied term, and there being no express terms to support the plaintiff's assertion, I thus had no hesitation in rejecting the appeal with costs.